86-1341

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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CONNECTICUT PERFORMING ARTS FOUNDATION, INC.

V.

HONORABLE GEORGE F. BROWN, TAX COMMISSIONER
FOR THE STATE OF CONNECTICUT

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

****

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EDITOR'S NOTE

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

CONNECTICUT PERFORMING ARTS
FOUNDATION, INC.,
Petitioner,

v.

HONORABLE GEORGE F. BROWN, TAX
COMMISSIONER OF THE STATE OF
CONNECTICUT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. WECHSLER, on behalf of Connecticut Performing Arts Foundation, Inc., petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit, departed from the accepted and usual course of Appellate review when it erroneously adopted and incorporated in its opinion a factual finding improperly made by the District Court for the District of Connecticut (Burns, J.) which

finding the District Court made at a time when it was exercising its jurisdiction as an Appellate Tribunal and which finding also constituted a departure from the accepted and usual course of Appellate review.

2. Whether the Decision of the United States Court of Appeals for the Second Circuit erroneously concluded that the Petitioner would not qualify as being similar to an exempt organization under I.R.C. 501(c)(3).

PARTIES

The only parties to the proceedings are contained in the caption of the case. The Petitioner has no other related corporations.

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TABLE OF AUTHORITIES

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 807 F.2d 566 (1986) (App. P. A-2-11). The Opinion of the United States District Court for the District of Connecticut is not reported. (App. P. A-14-43) The Opinion of the United States Bankruptcy Court for the District of Connecticut is unofficially reported in Volume 9 Connecticut Law Tribune #41 at p.9 (October 10, 1983) (App. P. A-47-61).

JURISDICTION

The Judgment of the United States Court of Appeals for the Second Circuit was entered on September 5, 1986. A petition for rehearing and rehearing en banc was denied on November 12, 1986. (App. P. A-1) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Connecticut General Statutes §12-541(b) provides as follows:

> No tax shall be imposed under subsection (a) of this section with respect to admission charges all the proceeds of which

inure exclusively to (1) organizations exempt from income taxes under the United States internal revenue code; or (2) in the absence of a ruling by the Internal Revenue Service, organizations determined by the state tax commissioner to be of a similar nature.

I.R.C. §501 provides in pertinent part:

(a) EXEMPTION FROM TAXATION.--An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

. . .

(c) LIST OF EXEMPT ORGANIZATIONS.--The following organizations are referred to in subsection (a):

. . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

(4) Civil leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of

employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

Bankruptcy Rules of Procedure 8013 provides as follows:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Federal Rules of Civil Procedure 52(a) provides:

> (a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses, The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the

findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT OF THE CASE

On September 29, 1971, the Petitioner, Connecticut Performing Arts Foundation, Inc., (hereinafter "CPAF"), a Connecticut non-stock, non-profit corporation, incorporated for the purpose of promoting the performing arts in the State of Connecticut, including operation of a summer theater, was granted an exemption from the Connecticut Admissions Tax pursuant to Connecticut General Statutes §12-541(b)(2). Said exemption was effective July 1, 1971, and was granted on the basis that the Petitioner was similar to an organization exempt from income tax pursuant to I.R.C. §501(c)(3).

The Tax Commissioner for the State of Connecticut purportedly revoked the Petitioner's exemption from the Admissions Tax, which purported revocation was to be effective

after December 31, 1983. The Petitioner protested this purported revocation and the Defendant held hearings thereon. On December 11, 1974, the Tax Commissioner for the State of Connecticut issued a memorandum which confirmed the revocation of Petitioner's exemption from the Admissions Tax and imposed past and future tax liability on the Petitioner.

In January, 1975, the Petitioner commenced an action in the Connecticut Court of Common Pleas (now Superior Court), seeking a determination that the Tax Commissioner's purported revocation was improper, that Petitioner was exempt from the Admissions Tax, and other appropriate relief.

In August, 1981, while the Petitioner's action was pending, the Petitioner filed a voluntary petition in the United States Bankruptcy Court for the District of Connecticut, seeking protection pursuant to Chapter 11 of the Bankruptcy Code. In November, 1981, the Petitioner, pursuant to 28 U.S.C. §1478(a), sought to have the state court

action removed to the Bankruptcy Court. Removal was thereafter granted over the Tax Commissioner's objection.

The case came to trial before the Bankruptcy Court as an adversary proceeding. On December 23, 1982, the Bankruptcy Court (Shiff, J), issued its ruling which determined that the revocation of the Admissions Tax exemption given to the Petitioner, was improper and ordered the Tax Commissioner for the State of Connecticut, to repay to the Petitioner, the money it paid under protest for Admissions Tax, and for which refund claims were pending. (App. P. A-47-61)

From the decision of the Bankruptcy Court and the judgment entered thereon (App. P. A-44-46), the Tax Commissioner for the State of Connecticut appealed to the United States District Court.

The United States District Court for the District of Connecticut (Burns, J.), reversed the decision of the Bankruptcy Court and dismissed the adversary proceeding with costs

to the Tax Commissioner of the State of Connecticut. (App. P. A-14-44)

The District Court was called upon to interpret Connecticut General Statutes §12-541(b)(2), and in so doing based its interpretation on its factual finding that "[t]he 'similar nature' exemption was added to take into account smaller organizations, such as PTAs, which do not normally seek IRS exemptions. See e.g., testimony of Patrick Marangell, Pg. 9, October 14, 1982". (App. P. A-29)

Thereafter, the Petitioner took an appeal to the United States Court of Appeals for the Second Circuit.

The Second Circuit Court of Appeals affirmed the judgment of the District Court. (App. P. A-2-11) In its opinion, the Court let stand and perpetuated the District Court's factual finding quoted hereinabove, adopting and incorporating that factual finding as a basis upon which it affirmed the District Court's decision. The Second Circuit Court of

Appeals stated: "The District Court found that the 'similar nature' exemption was added to the Admissions Tax to take into account smaller organizations such as PTAs that do not ordinarily seek IRS exemptions." (App. P. A-9, emphasis added).

Thereafter, the Petitioner filed a Petition for Rehearing and/or Rehearing En Banc, which petition was denied by the Second Circuit Court of Appeals on November 12, 1986 (App. P. A-1).

The Petitioner now seeks review by this Court by Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

The Decision of the Second Circuit obliterates the well established standard of Appellate review that precludes Appellate Courts from acting as finders of fact. In re Cadarette, 601 F.2d 648, 650 (2nd Cir. 1979). As recognized by the Second Circuit, the District Court made certain factual findings in connection with its statutory interpretation of Connecticut General Statutes §12-541(b)(2). (App. P. A-9) As a result, the Petitioner has

been subjected to a different standard of review than is required by Bankruptcy Rule 8013 (formerly Rule 810). This Rule is similar to Rule 52 of the Federal Rules of Civil Procedure.

The Petitioner's right to a determination in accordance with the aforesaid Rule, was violated by the District Court in that it clearly made an impermissible factual finding. (App. P. A-29) However, rather than correcting this egregious error, the Second Circuit Court of Appeals compounded it by adopting the District Court's factual finding in its opinion. (App. P. A-9)

Connecticut General Statute §12-541(b)(2) contained a provision which permitted the granting of an exemption from the Connecticut Admissions Tax if the petitioner was similar in nature to an organization exempt from Federal Income Tax.

In the District Court's opinion, quoted by the Second Circuit, the statutory construction of Connecticut General Statute §12-541(b)(2)

was predicated upon the District Court finding that "[t]he 'similar nature' exemption was added to the Admissions Tax to take into account smaller organizations, such as PTAs, that did not ordinarily seek IRS exemption from Federal Income taxation." (App. P. A-9)

In reviewing the District Court's statutory construction, the Second Circuit Court of Appeals adopted the factual conclusion of the District Court (Burns, J.), which factual conclusion was improper, and beyond the proper exercise of its judicial province as an appellate court. The District Court had no authority to make factual findings because it was acting solely as an Appellate Court for the purpose of reviewing the decision of the Bankruptcy Court to determine whether its judgment was clearly erroneous. Bankruptcy Rule §8013. Moreover, the record before the Bankruptcy Court clearly established that the finding of fact made by the District Court, and adopted by the Second Circuit, was controverted by substantial evidence.

The gravamen of the Petitioner's argument, and justification for the existence of such a long standing rule precluding Appellate Courts from making findings of fact, is readily apparent from the proceedings below.

The District Court chose to overlook the significant evidence contained in the Bankruptcy Court Record which established that the provision contained in Connecticut General Statutes §12-541(b)(2) was intended to benefit the Petitioner and similar organizations, and that Petitioner had substantial contacts with the Connecticut Tax Department concerning the formulation of this statutory provision.

Further, the evidence before the Bankruptcy Court demonstrated that the "similar nature" exemption provision of Connecticut General Statutes §12-541(b)(2) was suggested by the Petitioner and that the Petitioner reviewed the legislation with staff members working for the tax commissioner to confirm that the Petitioner would be able to avail itself of the benefits of the "similar nature" exemption. (See JA

177-180; 187-188; 201-202). Moreover, the proposed legislation was discussed by representatives of the Petitioner and the Tax Commissioner with knowledge of Petitioner's earlier denial of exemption from income tax under Internal Revenue Code §501(c)(4), said meetings being held both prior and subsequent to passage of the statute. (JA 201-208)

The above cited evidence before the Bankruptcy Court taken together with the fact that the Tax Commissioner knew of the Petitioner's earlier 1962 income tax exemption denial under §501(c)(4) of the Internal Revenue Code, led to the Bankruptcy Court's logical conclusion, that the statute was intended for the benefit of the Plaintiff and similar organizations.

Petitioner submits that certiorari should be granted so that its rights are subject to the same standard of judicial procedure as all other litigants coming before the Court.

Another reason to grant certiorari is that the Second Circuit Court of Appeals completely

overlooked the change in the law concerning private versus public purposes for tax exempt theatre organizations under the Internal Revenue Code. This change was enunciated in the case of Broadway Theatre League of Lynchburg, Va., Inc. v. United States, 293 F. Supp. 346 (1963).

The Petitioner herein, when seeking its exemption under Connecticut General Statutes §12-541(b)(2), advised the Tax Commissioner of its 1962 denial of Federal Income Tax exemption under Internal Revenue Code §501(c)(4), and sought its exemption as being "similar" to a 501(c)(3) organization. Thus, since it was seeking an exemption from the Connecticut tax as "similar" to a 501(c)(3) organization, Petitioner argued, and the Commissioner agreed, that said denial did not preclude its exemption.

The Second Circuit Court of Appeals in reviewing the District Court decision, commented that the 501(c)(4) denial, was fatal to the Petitioner because its status under

§501(c)(3) of the Internal Revenue Code, would violate the requirement that an exempt organization serve only a public rather than a private interest. (App. P. A-11-12)

The Second Circuit Court of Appeals then reasoned that the rationale of the 1962 Internal Revenue Service denial would still be applicable to the Petitioner's attempt to qualify for exemption as an organization "similar" to one qualified for exemption under Internal Revenue Code §501(c)(3).

The Second Circuit Court of Appeals, however, fails to recognize that the position of the Internal Revenue Service as stated in its 1962 denial of Petitioner's exemption, (which position was also taken by the Internal Revenue Service in 1964 when it denied an exemption to the Broadway Theatre League of Lynchburg, Va., Inc. pursuant to I.R.C. §501(c)(3)), has been invalid since 1968 when the District Court decided the Broadway Theatre League of Lynchburg, Va., Inc. case.

In the Broadway Theatre League of

Lynchburg, Va., Inc. case, the United States District Court overruled the Internal Revenue Service position and found that the operation of the Broadway Theatre League of Lynchburg, Va., Inc., which theatre was operated in a manner virtually identical to that of the Petitioner herein, was, in fact, serving a public interest and not a private interest. Accordingly, the District Court overruled the Internal Revenue Service and held that the Broadway Theatre League of Lynchburg, Va., Inc. qualified for exemption under Internal Revenue Code §501(c)(3). The opinion of the Second Circuit in this case, contains no reference to the Lynchburg decision yet its comment impliedly overrules that District Court decision.

The Petitioner respectfully submits that the Second Circuit erred when it stated:

> "[c]omparing the rationale for the denial of CPAF's 501(c)(4) application with the requirements of 501(c)(3), it appears that the very characteristic of CPAF fatal to its 501(c)(4) application would also require rejection of its application under §501(c)(3)." (App. P. A-10-11)

In light of the Broadway Theatre League of Lynchburg decision in 1968, Petitioner submits the above quoted portion of the Second Circuit opinion is in error because it adopts a standard which has been overruled and which conflicts with established law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Certiorari should be granted.

THE PETITIONER

BY_____

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(203) 348-1339

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

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CONNECTICUT PERFORMING ARTS FOUNDATION, INC.

V.

HONORABLE GEORGE F. BROWN, TAX COMMISSIONER
FOR THE STATE OF CONNECTICUT

****

PETITION FOR WRIT OF CERTIORARI

APPENDIX

****

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the city of New York, on the 12th day of November one thousand nine hundred and eighty-six.

CONNECTICUT PERFORMING ARTS FOUNDATION, INC.,

Plaintiff-Appellant,

v.

HON. GEORGE F. BROWN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Connecticut Performing Arts Foundation, Inc.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/
Elaine B. Goldsmith,
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 299—August Term 1985

Argued: October 16, 1985 Decided: September 5, 1986

Docket No. 85-5009

CONNECTICUT PERFORMING ARTS FOUNDATION, INC.,

Plaintiff-Appellant,

—against—

HON. GEORGE F. BROWN, TAX COMMISSIONER OF THE STATE OF CONNECTICUT,

Defendant-Appellee.

Before:

FRIENDLY*, KAUFMAN, and PRATT,

Circuit Judges.

* Judge Friendly participated in the panel's decision to certify certain questions on this appeal to the Connecticut Supreme Court. In light of his death on March 11, 1986, Judges Kaufman and Pratt are now deciding this appeal in accordance with § 0.14(b) of the rules of this court.

Connecticut Performing Arts Foundation appeals from a judgment of the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, holding that Conn. Gen. Stat. § 12-541(b)(2) did not authorize the tax commissioner to grant appellant an exemption from the state's admissions tax.

Affirmed.

ROBERT M. WECHSLER, Stamford, CT, (Michael Jon Barbarula, of Counsel), *for Appellant*.

RICHARD GREENBERG, Assistant Attorney General of the State of Connecticut, Hartford, CT (Joseph I. Lieberman, Attorney General for the State of Connecticut, of Counsel), *for Appellee*.

PRATT, *Circuit Judge*:

This action began in 1975 when plaintiff, the Connecticut Performing Arts Foundation ("CPAF"), sued in the Connecticut Court of Common Pleas to appeal the defendant tax commissioner's revocation of its exemption from the state's admissions tax. In November 1981, shortly after filing a bankruptcy petition under Chapter 11 of the Bankruptcy Code, CPAF removed the action to the bankruptcy court, which held that the commissioner had improperly revoked CPAF's exemption. The state ap-

pealed that ruling to the district court, which reversed, and this appeal followed. On March 10, 1986, we certified the determinative questions of law to the Connecticut Supreme Court. The opportunity to resolve the controlling question of state law having been rejected without comment, the matter is left for our resolution.

BACKGROUND

CPAF is a nonprofit Connecticut corporation organized for the purpose of promoting the performing arts in Connecticut, primarily through the operation of a summer theater. In 1962, CPAF applied to the Internal Revenue Service ("IRS") for an income tax exemption under section 501(c)(3) of the Internal Revenue Code. 26 U.S.C. § 501(c)(3). For some reason unexplained in this record, CPAF subsequently requested that the IRS consider its eligibility for an exemption under § 501(c)(4), rather than under § 501(c)(3). The IRS denied the exemption, finding that "the manner in which [CPAF had] operated is substantially similar to that of a commercial undertaking so as to preclude exemption under section 501(c)(4)."

The admissions tax at issue in this appeal, Conn. Gen. Stat. § 12-541 (the "new tax"), was enacted in July 1971 to replace Conn. Gen. Stat. § 12-526 (1969) (the "old tax"), which provided for exemptions simply by listing types of excluded organizations. The new tax, which itself has since been repealed, provided at all relevant times that

> (a) There is hereby imposed a tax of ten per cent of the admission charged to any place of amusement, entertainment or recreation * * *. The tax shall be imposed upon the person making such charge and

reimbursement for the tax shall be collected by such person from the purchaser. * * *

(b) No tax shall be imposed under subsection (a) of this section with respect to admission charges all the proceeds of which inure exclusively to (1) organizations exempt from income taxes under the United States Internal Revenue Code or (2) in the absence of a ruling by the Internal Revenue Service, organizations determined by the commissioner of revenue services to be of a similar nature.

Conn. Gen. Stat. § 12-541.

On April 27, 1971, prior to the passage of the new tax, representatives of the Connecticut Tax Department conducted a hearing regarding CPAF's application for exemption from both the old tax and the proposed new tax. The district court found that at that hearing CPAF disclosed the IRS's 1962 denial of CPAF's claimed income tax exemption under § 501(c)(4). CPAF urged that it nevertheless qualified for an exemption from the proposed new tax because it was of a "similar nature" to organizations eligible for exemptions under § 501(c)(3).

CPAF renewed its exemption application after Connecticut adopted the new admissions tax, and additional hearings were held in September 1971. In April 1972 the tax commissioner ruled that CPAF qualified as a "similar nature" organization, with the exemption "to remain in force as long as the operations of the Connecticut Performing Arts remains [sic] unchanged."

Only one year later, however, the tax commissioner notified CPAF that its exemption would expire at the end of the year unless CPAF obtained a ruling from the IRS that it qualified for a federal tax exemption. CPAF

contested this action at a hearing in December 1973. In January 1974 the commissioner revoked CPAF's exemption because "subsequent investigation by the department revealed that the organization was denied an exemption from the federal income tax on March 9, 1962." The commissioner then assessed taxes against CPAF in accordance with that revocation. In December 1974, after a rehearing, the tax commissioner reaffirmed the revocation, finding that in light of the "new information" about the denial of CPAF's 1962 application for a federal income tax exemption, the ruling made in 1971 [granting the exemption] was invalid." Under protest, CPAF paid over one million dollars in taxes.

The bankruptcy court found that the commissioner had been aware of the 1962 IRS ruling when he originally granted CPAF's exemption and, therefore, the court reasoned that there was no "new information" to justify the revocation. The bankruptcy court therefore reversed the commissioner's ruling and ordered a refund of all admissions taxes paid by CPAF, without prejudice to the tax commissioner's ability to conduct hearings and issue rulings which "prospectively affect CPAF's tax exempt status."

On appeal of the bankruptcy court ruling, the district court interpreted § 12-541(b)(2)—which allows an exemption for "similar nature" organizations "in the absence of a ruling by the Internal Revenue Service"—to mean that "the commissioner only had authority to grant an exemption if there had been either a favorable ruling by the IRS or no IRS ruling whatsoever." The district court therefore concluded that the commissioner was without authority to issue an admissions tax exemption in 1972 and that it was thus "incumbent upon the commissioner to revoke

that exemption when he became aware of his error." The district court further concluded that even if the bankruptcy court had correctly determined that the revocation was improper, the bankruptcy court's remedy, ordering repayment to CPAF of taxes paid, was itself improper.

CPAF appealed, and, on March 10, 1986, pursuant to the Uniform Certification of Questions of Law Act, 1985 Conn. Pub. Acts 85-111, we certified the following questions of law to the Connecticut Supreme Court:

> A. Under Connecticut General Statute § 12-541(b)(2), enacted as Public Act 71-837 in 1971 and since repealed, did the tax commissioner for the State of Connecticut have discretion to grant an exemption from the Connecticut admissions tax to appellant CPAF, an organization claiming to be of a similar nature to organizations exempt from federal income taxation under 26 U.S.C. § 501(c)(3), when the Internal Revenue Service had previously, in 1962, denied CPAF's application, made under 26 U.S.C. § 501(c)(4), for exemption from federal income taxes?
>
> B. Under the law of Connecticut, may appellant CPAF recover for itself admissions taxes collected from its patrons and paid to the State of Connecticut after December 31, 1973, the date upon which the tax commissioner for the State of Connecticut had notified appellant that its exemption from the admissions tax would be revoked, when it had included on the back of all tickets issued during this period a legend stating that, if the exemption were subsequently granted, the amount of the tax would be added to the admission charge?

Although resolution of these questions of Connecticut law by the Connecticut Supreme Court would appear to have been in the interest of judicial economy, the supreme court denied certification without comment. Left without guidance from the state on this question of state law portending serious consequences for a significant cultural institution in the State of Connecticut, we must now, for better or for worse, address the commissioner's revocation of CPAF's exemption.

DISCUSSION

Section 12-541(b) provided that no tax shall be imposed with respect to admission charges, all the proceeds of which inure exclusively to either organizations exempt from federal income taxes, or "in the *absence of a ruling* by the Internal Revenue Service, organizations determined by the commissioner of revenue services to be of a similar nature." (emphasis added). CPAF reasons that since the denial of its federal income tax exemption under § 501(c)(4) did not preclude it from applying for an exemption under § 501(c)(3), neither should that denial preclude the tax commissioner from finding CPAF similar to a § 501(c)(3) organization in granting an exemption on that basis. The state, on the other hand, essentially tenders a "plain meaning" argument; namely, that the statute says "in the absence of a ruling", and since there was a "ruling" in this instance, the commissioner was without authority to grant an exemption.

Connecticut law provides that statutes exempting a party from taxation are to be strictly construed against the party claiming the exemption. *See Connecticut Theater Foundation, Inc. v. Brown*, 179 Conn. 672, 427

A.2d 863, 866 (1980). In addressing the statute, we are to be guided by its language, purpose, and legislative history, *see Anderson v. Ludgin*, 175 Conn. 545, ____, 400 A.2d 712, 716 (1978), and "the legislative intent must be ascertained from the language of the statute itself if the language is plain and unambiguous", *Connecticut Theater Foundation*, 179 Conn. at ____, 427 A.2d at 865.

The district court found that the "similar nature" exemption was added to the admissions tax to take into account smaller organizations, such as PTAs, that do not ordinarily seek IRS exemption from federal income taxation. Judge Burns noted:

> Uncontroverted testimony was presented to the bankruptcy court that, when originally presented to the legislature, the admissions tax act only allowed exemptions to organizations that had received IRS exemptions. The "similar nature" exemption was added to take into account smaller organizations, such as PTAs, which do not normally seek IRS exemptions.

Indeed, the very purpose of this tax legislation was to align admissions tax liability with income tax exemptions allowed by the IRS. Thus, it makes sense that an organization denied an income tax exemption by the IRS could not be granted an admissions tax exemption by the Connecticut tax commissioner, absent a subsequent grant of an exemption by the IRS.

The plain meaning of the statute, the scant legislative history, and the statute's apparent purpose all indicate that the Connecticut tax commissioner lacked authority to grant an exemption. Section 12-541(b) means what it says; thus, the IRS's *ruling* denying CPAF an exemption

pursuant to § 501(c)(4) eliminated the commissioner's discretion to grant a "similar nature" exemption. Since the commissioner's grant of the exemption was not within his statutory authority, his original decision was a nullity, *accord United States v. Larionoff*, 431 U.S. 864, 873 & n.12 (1977), and he properly revoked CPAF's exemption.

Moreover, even accepting CPAF's argument that the § 501(c)(4) denial by the IRS did not preclude the commissioner from finding CPAF similar to a § 501(c)(3) organization, under the circumstances CPAF cannot realistically claim that there is an "absence of a [relevant] ruling". The IRS denied CPAF's § 501(c)(4) exemption, in part, because

> [In] view of the fact that the former operators of The Oakdale Musical Theatre Company, Inc., direct and control your operations, are stockholders in the lessor corporation of the facilities leased by you on a percentage of profits basis, and are privileged to conduct their private business operations on such property, it appears in part that you are operated in a manner designed to serve a private, rather than a public, interest.

An organization is not eligible for an exemption under § 501(c)(3) unless "it serves a *public* rather than a *private* interest." 26 C.F.R. § 1.501(c)(3)-1(d)(ii) (emphasis added). To meet this requirement the organization must "establish that it is not organized or operated for the benefit of private interests such as designated individuals, the creator or his family, shareholders of the organization, or persons controlled, directly or indirectly, by such private interests." *Id.* Comparing the rationale for the denial of CPAF's § 501(c)(4) application with the require

ments of § 501(c)(3), it appears that the very characteristic of CPAF fatal to its § 501(c)(4) application would also require rejection of its application under § 501(c)(3).

Nevertheless, it is sufficient for our conclusion that the plain meaning, legislative history, and purpose of § 12-541(b) mandate the result we reach. Because we hold that the tax commissioner was without discretion to grant CPAF its exemption from the admissions tax, we do not address the issue of CPAF's ability to recover the admissions tax it collected and paid after that exemption was revoked.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT PERFORMING ARTS FOUNDATION, INC.	)	
V.	)	CIVIL B-83-295 (EBB)
HON. GEORGE F. BROWN, Tax Commissioner of the State of Connecticut	)	

JUDGMENT

This cause came on for a hearing on the merits before the Honorable Ellen Bree Burns, United States District Judge, and a Memorandum of Decision having been filed on January 7, 1985, reversing the bankruptcy court's decision and dismissing the adversary proceeding, with costs to the defendant,

It is ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant reversing the bankruptcy court's decision and dismissing the adversary proceeding, with costs to the defendant.

Dated at New Haven, Connecticut, this 7th day of January, 1985.

KEVIN F. ROWE

CLERK, UNITED STATES

DISTRICT COURT

BY S/FRANCES J. CONSIGLIO

DEPUTY IN CHARGE

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CONNECTICUT PERFORMING ARTS FOUNDATION, INC.	:	
V.	:	CIVIL NO. B-83-295
HON. GEORGE F. BROWN, Tax Commissioner of the State of Connecticut	:	

MEMORANDUM OF DECISION

This action is an appeal from a decision of the bankruptcy court in an adversary proceeding originally brought in the Connecticut Court of Common Pleas as an appeal from a revocation of a tax exemption by the state tax commissioner. The plaintiff, Connecticut Performing Arts Foundation ("CPAF"), filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code in August, 1981. In November, 1981, CPAF removed the tax appeal to the bankruptcy court. After taking testimony and reviewing the record, the bankruptcy judge issued a decision on December 23, 1982, reversing the tax commissioner's revocation of CPAF's exemption and ordering

the State of Connecticut to pay CPAF the amount of any funds collected from CPAF as a result of the revocation of the exemption. Because I construe the Connecticut law differently from the bankruptcy court and, in any event, disagree with the remedy, the decision of the bankruptcy court is reversed.

I. FACTS[1]

CPAF is a nonprofit corporation organized and existing under the laws of the State of Connecticut. In 1962 CPAF applied to the Internal Revenue Service ("IRS") for a federal income tax exemption under §501(c)(4) of the Internal Revenue Code ("IRC"). The IRS denied the exemption, in part because it found that the operators of the Oakdale Musical Theater Company ("Oakdale") controlled CPAF's operations to the financial advantage of Oakdale. CPAF filed an appeal of this determination but withdrew the appeal before it was acted upon.

Some time prior to April 27, 1971, CPAF met with representatives of the Connecticut

Tax Department in order to obtain an exemption from the Connecticut tax on admissions[2] which imposed a ten per cent tax on the sale of tickets to events such as those sponsored by CPAF, but permitted certain organizations to be exempted from the tax.[3] CPAF claimed to qualify for an exemption because it was "of a similar nature" to an organization eligible for an exemption under § 501(c)(3) of the IRC.

At a hearing held on April 27, 1971, CPAF set forth facts showing that it was similar to organizations exempt under § 501(c)(3) of the IRC. It also disclosed that it had been denied an exemption under §501(c)(4). In June, 1971, a new admissions tax was adopted by the Connecticut General Assembly and CPAF renewed its exemption application. Additional hearings were held on September 17 and 19, 1971, and on or about April 5, 1972, the tax commissioner ruled that CPAF was qualified for an exemption from the 1971 act. The exemption was made retroactive to July 1, 1971.

On April 27, 1973, the tax commissioner sent CPAF a letter advising CPAF that its exemption would expire at the end of 1973 unless CPAF obtained a ruling from the IRS that it qualified for a federal tax exemption. CPAF contested the commissioner's ruling at hearing held on December 26, 1973. On January 25, 1974, the commissioner advised CPAF that its exemption was withdrawn because a "subsequent investigation by the department revealed that the organization was denied an exemption from federal income tax on March 9, 1962..." After a rehearing conducted on June 26, 1974, the tax commissioner ruled on December 11, 1974, that the exemption was properly revoked because of "new information", namely the March 9, 1962, denial of CPAF's application for a federal income tax exemption. CPAF brought its appeal to the court of Common Pleas on January 5, 1975, and removed the action to the bankruptcy court in November, 1982.

The bankruptcy court reviewed the

commissioner's decision to revoke the exemption pursuant to Conn. Gen. Stat. § 12-554.[4] It found that the commissioner was aware of the 1962 IRS ruling when he granted CPAF's exemption. Therefore, since there was no "new information" to justify revoking the exemption, the bankruptcy court reversed the commissioner's ruling and ordered a refund of all admissions taxes paid by CPAF. The state has taken a timely appeal from the bankruptcy court's ruling.

II. JURISDICTION

The State of Connecticut argues that the bankruptcy court was without jurisdiction in this matter for two reasons. It claims, first, that the Eleventh Amendment and the doctrine of sovereign immunity bar the entry of a monetary judgment against the state and, second, that the state court proceeding was improperly removed to the bankruptcy court.

A. Eleventh Amendment

The state claims that the bankruptcy court was without jurisdiction to order it to refund

taxes to CPAF by virtue of the Eleventh Amendment and the doctrine of sovereign immunity. It is true that, absent its consent, a state may not be sued in federal court. Pennhurst State School & Hospital v. Halderman, 52 L.W. 4155, 4157 (January 23, 1984). Furthermore, a suit against a state official is not permitted when the relief sought is the payment of money by the state as compensation for "a monetary loss resulting from a past breach of a legal duty." Edelman v. Jordan, 415, U.S. 651, 668 (1974).[5] Therefore, absent some bar to the application of the doctrine of sovereign immunity, the bankruptcy court should not have entertained this action.

Section 106(a) of the Bankruptcy Code, 11 U.S.C. § 106(a), provides that "[a] governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of

which such governmental unit's claim arose." The state argues that this waiver is not applicable in this case because it is a waiver of "sovereign immunity," and not a waiver of the Eleventh Amendment. However, closer analysis shows that the immunity applicable in this case is sovereign immunity, and not the Eleventh Amendment.

By its terms, the Eleventh Amendment prohibits suits in federal court "commenced or prosecuted by one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (emphasis supplied) The amendment does not itself prevent suits against a state by its own citizens. However, in Hans v. Louisiana, 134 U.S. 1 (1890), the Supreme Court determined that the policy behind the Eleventh Amendment, namely state sovereignty, prevented a federal court from entertaining a suit brought against a state by its own citizens. The technical distinction between Eleventh Amendment "immunity" and sovereign immunity was noted by

the court in Pennhurst:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification." Ex Parte State of New York No. 1, 256 U.S. 490, 497 (1921) (emphasis added)

52 L.W. at 4157. See also, Parden v. Terminal R. Co., 377 U.S. 184, 192 (1964).

Because the Eleventh Amendment is an "exemplification" of the doctrine of sovereign immunity, it is understandable that the amendment has come to be used as a shorthand expression of the principle that a state may not be sued by either its own citizens or citizens of another state. However, in determining the extent of the waiver contained in § 106(a), it is necessary to differentiate

between the doctrine of sovereign immunity and the application of the Eleventh Amendment.

Because CPAF is a "citizen" of the State of Connecticut, it is the doctrine of sovereign immunity that can be asserted by the state, and not the Eleventh Amendment. Therefore, if the waiver of sovereign immunity contained in § 106(a) is effective as a legitimate exercise of congressional authority, and is applicable in this case, the bankruptcy court could exercise its jurisdiction over the state.

In Parden v. Terminal R. Co., 377 U.S. 184 (1964), the Supreme Court was confronted with the question of whether the Federal Employee Liability Act (FELA) permitted a suit against a state in federal court. The Court noted that a state can consent to a suit in federal court and also noted that, in adopting the Constitution, the states "surrender a portion of their sovereignty when they granted Congress the power to regulate commerce." Id. at 191. The court went on to note that when a

state engaged in an activity subject to the commerce power, in that case operating a railroad, it necessarily consented to suits under the FELA. Id. at 192.

Similarly, the states have granted Congress authority under the bankruptcy clause of the Constitution. When a state engages in an activity that is subject to the bankruptcy power, it is proper for Congress to find that the state has waived its sovereign immunity.[6] Section 106(a) provides that, when a governmental unit has made a claim against the estate, it has waived its immunity with respect to claims against the state that arose out of the same transaction.[7] By making a claim against the estate, the state subjects itself to the bankruptcy power of the United States. The waiver of immunity provided by § 106(a) is therefore a proper exercise of congressional authority.

The state has not argued that its claim against the estate did not arise out of the same transaction as CPAF's claim against the

state. The state's claim is a claim for admissions taxes that had not been paid by CPAF after the tax commissioner had revoked CPAF's exemption. CPAF's claim against the state is also for taxes paid after the commissioner revoked the exemption. Both claims arise out of the same transaction, the revocation of the exemption, and therefore, § 106(a) permits the bankruptcy court to exert jurisdiction over CPAF's claim against the state.

B. Removal

The state argues that the bankruptcy judge erred in allowing removal of this action because Interim Rule 7004, adopted in this district as Local Rule 7004, only permits removal of a state court action within thirty days of the order for relief.[8] Because the application for removal was filed nearly three months after the order for relief, the state asserts that removal should not have been permitted.

The bankruptcy judge conducted hearings on

whether to permit removal, and was persuaded by the reasoning of In re Circle Litho, Inc., 12 B.R. 752 (Bkry. Conn. 1981), which held that the thirty-day limitation of Rule 7004 was not mandatory. The Circle Litho court noted that, unlike the thirty-day removal limit of 28 U.S.C. § 1446 for cases removed to the district court, Rule 7004's limit was not statutorily required. Section 1478, which authorizes removal of cases from state courts to the bankruptcy court, does not contain any time limit. In drafting Rule 7004 the Advisory Committee stated that the time limit was derived from § 1446. See Collier on Bankruptcy, Appendix 1, 1092 (1983). However, the fact that the committee was guided by a statutory provision does not give the rule the force of law of a statute.

Because the time limitation is contained in a rule, the Circle Litho court saw no reason why Rule 906 which generally permits enlargement or reduction of time limits set by the rules should not apply. 12 B.R. at 756.

Rule 906(b)(2) permits application for an enlargement of time after the expiration of the relevant time period, where the failure to act was the result of excusable neglect.[9] The bankruptcy court heard evidence and argument and found that enlarging the time for removal was appropriate. The state has not made any showing to this court that the bankruptcy court erred in determining that enlargement was appropriate under the facts presented.

III. Statutory Interpretation.

The State of Connecticut argues that, because CPAF was denied an exemption from IRS in 1962, the commissioner was without authority under the admissions tax statute to grant an exemption. The commissioner argues that, through inadvertence or otherwise,[10] the 1962 denial was not drawn to his attention at the time the exemption was granted in 1972. When he learned of the denial, he acted in compliance with the law in revoking the exemption. He further claims that, in light

of the IRS ruling, he was without authority to grant CPAF an exemption. If an administrative agency's ruling is not within the authority granted by statute it is a nullity. United States v. Larionoff, 431 U.S. 864 (1977). Therefore, if the commissioner exceeded the grant of authority to issue exemptions found in § 12-541(b)(2), it was proper for him to revoke the exemption, or to treat it as being without effect.

Section 12-541(b)(2) permits the commissioner, "in the absence of a ruling by the Internal Revenue Service...", to grant an exemption to an organization of a "similar nature" to an organization exempt from taxation under the IRC (emphasis added). CPAF argues that this statute should be interpreted to mean that the commissioner is not precluded from granting an exemption based on any IRS ruling and that he would only be precluded if the IRS ruling were under the specific tax code section under which the applicant claims exemption by reason of a similarity to an

exempt organization. Since CPAF was denied an IRS exemption under § 501(c)(4), its application for an admissions tax exemption based on its similarity to a § 501(c)(3) organization would not be precluded.

CPAF's interpretation of the statute is a reasonable one. However, Connecticut case law is clear that laws granting tax exemptions should be strictly construed against the applicant. Caldor, Inc. v. Heffernan, 183 Conn. 566, 571 (1981); Connecticut Theater Foundation, Inc. v. Brown, 179 Conn. 572, 677 (1980). Although a court should not construe a statute in such a way as to prevent "a reasonable and rational result," Stone v. Sullivan, 154 Conn. 498, 503 (1967), strict construction of an exemption statute is required if it would not contravene the "intent and purpose of the statute as expressed in the language used." Jewett City Savings Bank v. Board of Equalization, 116 Conn. 172, 185 (1933). The legislature permitted the commissioner to grant an

exemption only if the organization had qualified for an IRS exemption or if the IRS had not issued a ruling. Uncontroverted testimony was presented to the bankruptcy court that, when originally presented to the legislature, the admissions tax act only allowed exemptions to organization that had received IRS exemptions. The "similar nature" exemption was added to take into account smaller organizations, such as PTAs, which do not normally seek IRS exemptions. See e.g., testimony of Patrick Marangell, p. 9, October 14, 1982. The legislature could well have reasoned that organizations too small to seek an IRS determination of any sort should be allowed to avoid the IRS administrative process and apply directly to the commissioner. However, an organization that had the motivation and capability of seeking an IRS ruling would be required to have an IRS exemption before it would qualify for an exemption under the admissions tax act. It is clear from the statutory language that the

legislature wanted IRS criteria to apply to the granting of an exemption. It would therefore be preferable to have the IRS make a determination of eligibility for an exemption, and only permit the commissioner to determine eligibility if the IRS has not issued any ruling at all. Once the IRS has issued any ruling, the commissioner would be bound by that determination unless the organization sought a new ruling from the IRS.[11] In other words, the commissioner only had authority to grant an exemption if there had been either a favorable ruling by the IRS or no IRS ruling whatsoever.[12]

The clear language of § 12-541(b)(2) only permits an exemption if the IRS has not issued a ruling. Strictly construing this statute against the party seeking an exemption, and in a manner which is rational and reasonable in light of the language used by the legislature, the commissioner was without authority to issue an admissions tax exemption in 1972. It was therefore incumbent upon the commissioner

to revoke that exemption when he became aware of his error. The bankruptcy court's order reversing the commissioner must itself be reversed.

IV. The Remedy

Even if the bankruptcy court had been correct in its determination that the revocation of the exemption was improper, its order for repayment to CPAF of the amount of funds collected as a result of the exemption was improper. the admissions tax is "imposed upon the person making such charge [for admission] and reimbursement for the tax shall be collected by such person from the purchaser." Conn. Gen. Stat. § 12-541(a). Thus, rather than being a direct tax on the theater operator, the tax is a "transactional tax," like a sales tax, imposed upon the theater's patrons. Cf. Agricultural National Bank v. State Tax Commissioner, 392 U.S. 339 (1968) (the purchaser is the true taxpayer of a sales tax.) CPAF does not deny that it collected the ten per cent tax on each of its

tickets sold during the relevant period. It now seeks a refund for a tax that it never paid, except as a conduit of the taxes paid by its customers.

In Spencer v. Consumers Oil Co., 115 Conn. 554 (1932), the Connecticut Supreme Court faced an analogous situation. A gasoline dealer had collected a sales tax from its patrons but did not pay the money collected over to the state, claiming that the gasoline tax statute was invalid. The court found that it did not need to address the defendant's contentions regarding the validity of the statute because, by collecting the tax, the defendant had obligated itself to pay the money over to the treasurer. Id. at 559. The court stated that "the defendant has in good conscience no right to retain this money and is charged with a heavy moral obligation to make the payment." Id. at 562.[13]

CPAF attempts to argue that it did pay the tax by noting that it had stamped a legend on the back of its tickets, informing its patrons

that it had applied for an exemption and, if the exemption was granted, the amount of tax charged would be added to the admissions charge. CPAF claims that this legend created a contract between itself and its patrons entitling CPAF to keep the tax paid if an exemption was granted.

This position is without merit for several reasons. First, CPAF made no showing that the legend appeared on the tickets after the revocation of the exemption. Second, the legend misrepresents CPAF's position in that it states that CPAF had applied for an exemption, when in fact, during the relevant period, CPAF was appealing from a revocation of an exemption. Finally, and most significantly, CPAF has simply failed to show that the legend created an enforceable contract right.

The front of the tickets bore the admissions price, an amount denominated as tax, and the total price. Presumably, a customer paying for his ticket paid the total

price, believing that he was paying for his admission and any applicable tax. It would only be after purchasing his ticket that the customer might possibly become aware of the legend on the reverse of the ticket. General principles of contract law preclude a finding that the legend became part of the contract of admission. Malone v. Santora, 135 Conn. 286, 291-92 (1949); Carter v. Reichlin Furriers, 34 Conn. Sup. 661, 665 (App. Sess. 1977). See also A. Corbin, Corbin on Contracts § 107 (1963) ("meeting of the minds" required for a valid contract.) Furthermore, Connecticut's "anti-scalping" statute, Conn. Gen. Stat. § 53-289, establishes a policy in favor of fixed ticket prices. In light of this policy, an attempt to vary the price by stamping a legend on the back of the ticket must be viewed as ineffective. Therefore CPAF had no contract right to keep any refund of taxes that might be ordered.[14] Since the parties who would have been entitled to receive such a refund, CPAF's customers, were not before the court,

the ordering of a refund to CPAF was an improper remedy.[15]

Conclusion

The bankruptcy court's decision is reversed. The adversary proceeding is hereby dismissed with costs to the defendant.

SO ORDERED.

S/ELLEN BREE BURNS

UNITED STATES DISTRICT JUDGE

Dated at New Haven, Connecticut, this 7th day of January, 1985.

F O O T N O T E S

1. The facts are essentially as stated in the opinion below. I realize that the state asserts that the bankruptcy court's judgment is ineffective because the judgment was entered after the December 24, 1982, effective date of the Northern Pipeline decision, even though the decision was entered on December 23, 1982. Because I find that the opinion below must be reversed even under the facts as found by the bankruptcy court, I will not decide whether the bankruptcy court's decision should be reviewed de novo as a "proposed judgment" under § e(2)(A)(iii) of the Emergency Rule.

2. The tax in question is this suit, Conn. Gen. Stat. § 12-541, became effective on July 1, 1971. Prior to that date, an admissions tax law passed in 1969 was in effect. CPAF applied for exemption under both laws. It was denied an exemption under

the 1969 law. That denial is not in issue at this time.

3. During all relevant times Conn. Gen. Stat. § 12-541 (b) provided:

> no tax shall be imposed under subsection (a) of this section with respect to admission charges all the proceeds of which inure exclusively to
>
> (1) organizations exempt from income taxes under the United States Internal Revenue Code; or
>
> (2) in the absence of a ruling by the Internal Revenue Service organizations determined to be of a similar nature.

4. Section 12-554 provides in applicable part:

> Any taxpayer aggrieved because of any order, decision, determination or disallowance of the tax commissioner under the provisions of sections 12-540 to 12-556 may, within one month after service upon the taxpayer of notice of such order, decision, determination, or disallowance, take an appeal therefrom.... Said court may grant such relief as may be equitable....

The section does not define the standard of review to be applied by the reviewing court. The bankruptcy court appeared to review the commissioner's ruling de novo, and took extensive testimony. Because I find that the bankruptcy court erred in its application of law and in the remedy granted, it is not necessary to determine the applicable standard of review under section 12-554. However, because tax appeals are explicitly exempted from the deferential review provided by the Connecticut Administrative Procedures Act, see Conn. Gen. Stat. § 4-186, it may be assumed that the Connecticut legislature intended to give the courts wider latitude in reviewing tax commissioner's determinations.

5. CPAF asserts that since its action is one for a refund of taxes wrongfully collected, it is not an action for damages but an action for return of property. This position was rejected by the Supreme Court in Ford Motor Company v. Department of Treasury, 323 U.S. 459 (1945).

6. It is not now necessary to address whether Congress has authority under the bankruptcy clause to waive a state's Eleventh Amendment immunity in suits by citizens of other states.

7. In Parden, supra, the court found that the state had consented to suit under the FELA even though the FELA did not expressly provide for the waiver of sovereign immunity. The waiver provisions of §106 show a more explicit intent to permit suits against states and give the states fair notice of the consequence of asserting claims against the estate. Courts will find a waiver of sovereign immunity by the most express language or "by such overwhelming implications from the text as [will] leave any room for any other reasonable construction." Edelman v. Jordan, 415, U.S. 651,673 (1974) (quoting Murray v. Wilson Distilling Co., 213, U.S. 151, 171 (1909)).

8. In a voluntary case, such as this,

the commencement of the case constitutes an order for relief. 11 U.S.C. § 301.

9. The state argues that since CPAF did not apply for an enlargement of time, permitting such an enlargement was improper. However, CPAF applied for removal after the time period had passed and the state objected because the application was untimely. It was not an abuse of discretion for the bankruptcy court to treat the late application as an application for an enlargement of time. because the state raised its timeliness objection it was not prejudiced by the bankruptcy court so treating the application.

10. The commissioner points ut that, even if CPAF informed the tax department of the 1962 denial at the April 27, 1971, hearing, at a hearing held in December of 1973, CPAF was maintaining that it withdrew its application for an IRS exemption before before a final ruling was issued. The commission points out this discrepancy to demonstrate that there was some confusion

even among CPAF's representatives as to the existence or non-existence of a prior IRS ruling.

11. CPAF attempts to stress the difference between its denial of an IRS exemption under § 501(c) (4) and its application for an admissions tax exemption based on § 501 (c) (3). In actuality, the criteria for these two exemptions are essentially the same. See Bittker, "The exemption of Non-Profit Organizations from Federal Income Taxation," 85 Yale L.J. 299, 346-47 (1976).

The IRS denied CPAF's tax exemption in 1962 because it was operated in such a way as to provide a benefit to a private corporation. Unless there has been a change in CPAF's method of operations, which does not appear on the record, it is unlikely that CPAF would qualify for a § 501(c) (3) exemption. In fact, CPAF applied for a § 501(c) (3) exemption in 1973, but withdrew the application when it discovered that the IRS

was aware of its denial in 1962. See Testimony of Robert Hall, Jr. Nov. 5, 1982, p. 175.

12. In 1982 the statute was amended to remove all discretion from the commissioner in evaluating an organization's eligibility. Only organizations that have received IRS exemptions may receive an admissions tax exemption. Conn. Gen. Stat. § 12-541 (1983)

13. CPAF has argued that, prior to removal, the state court judge granted CPAF's demurrer to the state's affirmative defense of unjust enrichment, thereby creating the "law of the case" which is binding on this court. That argument is spurious for at least three reasons. First, sitting as a court of appeals, this court may review decisions made below. Second, even if the affirmative defense was properly stricken, the bankruptcy court must consider the issue of unjust enrichment in fashioning an equitable remedy. Finally, the Connecticut Supreme Court has clearly stated that "the law of the case" is

not res adjudicata so as to prevent the making of correct decisions later in a case. Barnes v. Schlein, 192 Conn. 732, 734 (1984).

14. Contrary to CPAF's contention, Connecticut Theater Foundation v. Brown, 179 Conn. 672 (1980) does not indicate that such a legend may create an enforceable contract right. Connecticut Theater found instead that designated portions of revenue collected as a tax should be turned over to the state. Id. at 676.

15. Because the admissions tax statute was changed in 1982, CPAF would not now be entitled to an exemption since it has not received an exemption from the IRS. See note 12, supra. Therefore, the bankruptcy court's order reversing the commissioner's revocation of CPAF's exemption is moot and without effect. It is not necessary, therefore, to determine whether such an order would violate the Supreme Court's holding in Pennhurst, supra, that a federal court cannot order a state official to comply with state law.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re	Chapter 11
CONNECTICUT PERFORMING ARTS FOUNDATION, INC.,	Case No. 5-81-00887
Debtor	

CONNECTICUT PERFORMING ARTS FOUNDATION, INC.	
Plaintiff	
v.	
HONORABLE GEORGE F. BROWN TAX COMMISSIONER OF THE STATE OF CONNECTICUT,	
Defendant	

JUDGMENT

This action came on for a trial before the United States Bankruptcy Court for the District of Connecticut at Bridgeport, and, on December 23, 1982, the issue having been duly tried, the Bankruptcy Court entered a decision granting the following relief to the plaintiff, Connecticut Performing Arts Foundation, Inc.:

"1. The tax commissioner's ruling which revoked CPAF's exemption is reversed, and

2. The treasurer of the State of Connecticut is ordered to pay CPAF the amount of any funds collected from CPAF as a result of the revocation of CPAF's exemption."

NOW THEREFORE, IT IS ORDERED, Judgment enter in accordance with the decision rendered by the bankruptcy court on December 23, 1982, in favor of Connecticut Performing Arts Foundation, Inc., granting relief as set forth above.*

Dated at Bridgeport, Connecticut, this 24th day of March, 1983.

s/
Alan H. W. Shiff
United States Bankruptcy Judge

*In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ____U.S. _____, 102 S. Ct. 2858 (1982), the Supreme Court held that the grant of power to Bankruptcy Judges in 28 U.S.C § 1471 was unconstitutional. The Supreme Court stated that the Marathon decision was to apply prospectively, Id. at 2880, and stayed the effective date of the decision through December 24, 1982.

I regard the entry of the judgment pursuant to Bankruptcy Rule 921 as a ministerial act to formalize the decision entered by the court on December 23, 1982.

Accordingly, a final judgment is ordered rather than a proposed judgment under paragraph (d) (3) (B) of the Emergency Resolution For Administration Of Bankruptcy System adopted by the District Court for the District of Connecticut on December 22, 1982.

For the same reason, this court has entered a dispositive order, rather than a proposed order, denying the defendant's fact, conclusions of law and judgment . . ."

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re	Chapter 11
CONNECTICUT PERFORMING ARTS FOUNDATION, INC.,	Case No. 5-81-00887
Debtor	
CONNECTICUT PERFORMING ARTS FOUNDATION, INC., Plaintiff	
v.	Adv. No. 5-81-0408
HONORABLE GEORGE F. BROWN TAX COMMISSIONER OF THE STATE OF CONNECTICUT, Defendant	

APPEARANCES

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Alan H. W. Shiff,
United States Bankruptcy Judge

I.

BACKGROUND

This matter comes before the court[1/] in the posture of an appeal taken by the plaintiff, Connecticut Performing Arts Foundation, Inc. (CPAF) from an adverse ruling by the defendant, tax commissioner of the State of Connecticut, now known as the Commissioner of Revenue Services (tax commissioner).[2/] In this appeal, CPAF seeks

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1/ This appeal, originally commenced in the Court of Common Pleas of the State of Connecticut at Hartford, was removed to this court pursuant to 28 U.S.C. §1478(a).

2/ Section 12-554 of the Connecticut General Statutes in applicable part is as follows:

> Any taxpayer aggrieved because of any order, decision, determination or disallowance of the tax commissioner under the provisions of sections 12-540 to 12-556 may, within one month after service upon the taxpayer of notice of such order, decision, determination or disallowance, take an appeal therefrom... Said court may grant such relief as may be equitable...

a reversal of the tax commissioner's ruling which revoked an exemption from the Connecticut admission tax. In addition, CPAF seeks equitable relief in the form of a decision that its exemption from that tax, granted by the tax commissioner in 1971, is and will continue in effect until that exempt status is terminated, prospectively, by a valid decision of the tax commissioner.

In that context, the scope of this inquiry is limited to a review of the record below and to such other relief as may be appropriate under Conn. Gen. Stat. § 12-554. Since the record below did not consist of a single transcript and exhibits, it is necessary to reconstruct the record from the evidence presented during this proceeding. the record as reconstructed follows.

Prior to April 27, 1971, representatives of CPAF met with representatives of the Connecticut Tax Department to review CPAF's operations and provide information in support of CPAF's contention that it was similar to an

organization qualified for federal income tax exemption under the United States Internal Revenue Code (tax code) section 501(c)(3).

On April 27, 1971, a hearing was conducted by the Connecticut Tax Department in connection with CPAF's application for an exemption from the 1969 as well as the proposed 1971 admission tax. At that hearing, CPAF again set forth facts that it was similar in nature to an organization exempt under the tax code. During that hearing, CPAF's financial and operational history was disclosed and reviewed, including the March 9, 1962 Internal Revenue Service's (IRS) denial of CPAF's application for a federal income tax exemption under tax code section 501(c)(4).

On June 5, 1971, the 1971 admission tax was adopted by the Connecticut Senate. On June 8, 1971, a representative of CPAF met with a representative of the tax commissioner for the purpose of providing legal authority in support of CPAF's claim that it was similar in nature to an organization exempt from

federal taxes under tax code section 501(c)(3). On June 9, 1971, the 1971 admission tax was adopted by the Connecticut General Assembly.

After the adoption of the 1971 admission tax, CPAF renewed its application for an exemption. Hearings were conducted by the Connecticut Tax Department on September 17 and 29, 1971. On or about April 5, 1972, the tax commissioner ruled that CPAF was exempt under the 1971 tax, effective July 1, 1971. The statutory authority for CPAF's exemption was Conn. Gen. Stat. § 12-541(b)(2).[3/]

3/ Conn. Gen. Stat. § 541(b)

> No tax shall be imposed under subsection (a) of this section with respect to admission charges all the proceeds of which inure exclusively to
>
> (1) organizations exempt from income taxes under the United States Internal Revenue Code; or
>
> (2) in the absence of a ruling by the Internal Revenue Service organizations determined by the state tax commissioner to be of a similar nature.

The ruling further provided that the exemption "is to remain in force as long as the operations of the Connecticut Performing Arts remains [sic] unchanged." (Pl. Ex. 1 and 3)

On April 27, 1973, the tax commissioner sent CPAF a letter advising CPAF that its exemption from the admission tax would expire at the end of 1973 unless CPAF obtained a determination from the IRS that it qualified for a federal tax exemption. (Pl. Ex. 6) As a result of that decision, CPAF requested a hearing to contest the tax commissioner's ruling. On December 26, 1973, the tax commissioner conducted the hearing and on January 25, 1974, the tax commissioner sent CPAF a letter advising CPAF that the exemption from the admission tax was withdrawn pursuant to the April 27, 1973 notification because a "subsequent investigation by the department revealed that the organization was denied an exemption from Federal Income Tax on March 9, 1962..." (Pl. Ex. 13) A rehearing on the tax commissioner's revocation was conducted on

June 26, 1974. On December 11, 1974, the tax commissioner ruled that the exemption was properly revoked because of "new information," namely, the March 9, 1962 denial of CPAF's application for exemption under tax code section 501(c)(4). On January 5, 1975, this appeal was commenced in the Court of Common Please of the State of Connecticut for Hartford County at Hartford.

CPAF's appeal took the form of a complaint which was revised by a December 8, 1975 substituted complaint. The tax commissioner filed an answer which was amended twice. The applicable pleadings for the purpose of this appeal are CPAF's December 8, 1975 Substituted Complaint and the tax commissioner's August 31, 1982 Second Amended Substituted Answer. No technical objections have been raised as to the form of this appeal or compliance with Conn. Gen. Stat. § 12-554.

II.

ISSUE ON APPEAL

Did the tax commissioner err in revoking CPAF's exemption from the admission tax, imposed by Conn. Gen. Stat. § 12-541(a)?[4/]

III.

DISCUSSION

A.

It is clear from the record that the tax commissioner revoked CPAF's exemption because of "new information furnished to the

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4/ Conn. Gen. Stat. § 12-541(a)

> There is hereby imposed a tax of ten percent of the admission charge to any place of amusement, entertainment or recreation, except that no tax shall be imposed (1) when the admission charge is less than one dollar, or (2) when a daily admission charge is imposed which entitles the patron to participate in an athletic or sporting activity. The tax shall be imposed upon the person making such charge and reimbursement for the tax shall be collected by such person from the purchaser. Such reimbursement, term "tax," shall be paid by the purchaser to the person making the admission charge. Such tax, when added to the admission charge, shall be a debt from the purchaser to the person making the admission charge and shall be recoverable at law.

Connecticut Tax Department in 1974." (Pl. Ex. 14) The alleged new information was an adverse ruling by the IRS on March 9, 1962 furnished to the tax commissioner by the Connecticut Legislative Audit. Committee. On the basis of that information, the tax commissioner concluded that he lacked authority to grant an exemption under Conn. Gen. Stat. § 12-541(b). I do not agree with the tax commissioner's conclusion. Before addressing that issue, however, it is necessary to comment on the foundation upon which the tax commissioner rested his revocation -- to wit:

> It is the position of the Department that the exemption was properly revoked based upon the new information furnished to the Department. If all the facts had been known in 1971, the taxpayer's request for an exemption would have been denied. (Pl. Ex. 14, P. 3)

The evidence in the record below persuades me that representatives of the tax commissioner were advised that CPAF applied for and had been denied a federal income tax exemption (e.g., Pl. Ex. 2, P. 4). This

conclusion is buttressed by the tax commissioner's superseded answer (Pl. Ex. 8) admitting paragraph 12 of CPAF's December 8, 1975 Substituted Complaint which alleged as follows:

> Prior to April 5, 1972, the plaintiff [CPAF], through its agents, advised the defendant [tax commissioner], through his agents, that it had applied for an application for income tax exemption from the Internal Revenue Service and that said application was denied.

Even if the adverse IRS ruling were new information, the tax commissioner's conclusion that he lacked authority to grant an exemption because of that ruling is in error.

While tax exemption statutes are strictly construed against the party seeking an exemption "such construction neither requires nor permits the contravention of the true intent and purpose of the statute as expressed in the language used." Jewett City Savings Bank v. Board of Equalization, 116 Conn. 172, 185, 164 A. 643, 647 (1933). A traditional approach to statutory construction is to analyze the language of the statute in the

context of legislative intent on the assumption that the legislative branch chose particular words to accomplish a specific purpose. Rockefeller v. Commissioner of Internal Revenue, 676 F.2d 35 (2d Cir. 1982); Hartford Hospital v. Hartford, 160 Conn. 370, 375, 279 A.2d 561, 563-64 (1971).

The plain, unambiguous language of Conn. Gen. Stat. § 12-541(b) mandates an exemption from the admission tax if either of two conditions are met. If (1) the IRS exempted an organization from income taxes under the tax code or if (2) in the absence of a ruling by the IRS, the tax commissioner determines that the organization is similar in nature to an organization exempt under the tax code, then the organization is entitled to an exemption.

The Connecticut legislature clearly intended to permit the tax commissioner to make a determination of exempt status if the IRS had not ruled on that question. The tax commissioner's contention that any adverse

ruling by the IRS removes his authority to grant an exemption under any other tax code section unreasonably restricts his authority under the statute and distorts legislative intent. "Courts must assume that the legislature intended a reasonable and rational result and must, when possible, construe statutes accordingly" Stone v. Sullivan, 154 Conn. 498, 503, 227 A.2d 76, 78 (1967).

The tax commissioner was given authority to determine whether an organization was similar in nature to an organization entitled to exemption under the tax code. Obviously in making such a determination, the tax commissioner must analyze the applicant's similarity to organizations exempt under the specific tax code section under which the applicant applied. It is irrelevant in the first instance whether the applicant could also qualify under another tax code section. It therefore follows that it should be no more relevant if the applicant had been previously denied an exemption under such other tax code

section. Otherwise the statutory standard "of a similar nature" would be meaningless and inoperative.

Here CPAF applied for and was refused an exemption by the IRS under tax code section 501(c)(4). CPAF thereupon applied to the tax commissioner for an admission tax exemption on the basis that it was similar in nature to a section 501(c)(3) organization. The IRS had not ruled on CPAF's eligibility for an exemption under tax code section 501(c)(3). The tax commissioner's conclusion, based on his belief that he lacked authority to grant an admission tax exemption, was therefore in error.

B.

Section 12-554, as noted, provides that the court, to which the appeal is taken, "may grant such relief as may be equitable..." In this case, an exemption has been improperly revoked. The ruling which granted the exemption was to stay in effect "as long as the operations of the Connecticut Performing

Arts remains [sic] unchanged" (Pl. Ex. 3).

The tax commissioner did not conduct any investigation to determine whether CPAF changed its operations nor has the tax commissioner claimed or offered any evidence of any such change. Furthermore, the tax commissioner has not offered any persuasive evidence to rebut CPAF's claim and proof that it is similar in nature to a section 501(c)(3) organization. Indeed, the tax commissioner's grant of CPAF's exemption in 1971 was based upon his conclusion that CPAF was similar in nature to a federally tax exempt organization. Because of the public policy consideration which favors the principle that administrative agencies should not be permitted to reverse themselves absent new evidence or a change of circumstances, and because those exceptions are not found here, the tax commissioner should not now be permitted to rule that CPAF's exemption is revoked retroactively. Hoffman v. Kelly, 138 Conn. 614, 616-17, 88 A.2d 382, 383 (1952);

Middlesex Theatre, Inc. v. Hickey, 128 Conn. 20, 22, 20 A.2d 412, 413 (1941) Waterbury Savings Bank v. Danaher, 128 Conn. 78, 92, 20 A.2d 455, 463 (1940). The tax commissioner is, however, free to conduct hearings and issue rulings which prospectively affect CPAF's tax exempt status.

ACCORDINGLY:

1. The tax commissioner's ruling which revoked CPAF's exemption is reversed, and

2. The treasurer of the State of Connecticut is ordered to pay CPAF the amount of any funds collected from CPAF as a result of the revocation of CPAF's exemption.

Dated at Bridgeport, this 23 day of December, 1982.

S/Alan H. W. Shiff
United States
Bankruptcy Judge